

**STATE OF INDIANA
Board of Tax Review**

Alex M. and Susan K. Mishel)	On Appeal from the Hamilton County
)	Property Tax Assessment Board
Petitioner,)	of Appeals
)	
v.)	Petition for Review of Assessment, Form 131
)	Petition No. 29-003-99-1-5-00009
HAMILTON COUNTY PROPERTY TAX)	Parcel No. 1713050005003000
ASSESSMENT BOARD OF APPEALS)	
And CLAY TOWNSHIP ASSESSOR,)	
)	
Respondents.)	

Findings of Fact and Conclusions of Law

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

Issues

1. Whether the grade is correct.
2. Whether the neighborhood desirability rating is correct.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. Pursuant to Ind. Code § 6-1.1-15-3, Milo Smith, on behalf of Alex M. and Susan K. Mishel (Petitioner), filed a petition requesting a review by the State. The Form 131 petition was filed on November 5, 1999. The Property Tax Assessment Board of Appeal's determination on the underlying Form 130 was issued on October 12, 1999
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on June 8, 2000 before Hearing Officer John Nussel. Testimony and evidence was presented. Milo Smith, Tax Consultants, Inc. represented the Petitioners. Lori Harmon represented Hamilton County. No one was present to represent Clay Township.
4. At the hearing, the subject Form 131 was made a part of the record and labeled Board Exhibit A. Notice of Hearing on Petition is labeled Board Exhibit B. In addition, the following exhibits were submitted to the State:
 - Board Exhibit C - A Continuance/Waiver Agreement dated April 6, 2000.
 - Board Exhibit D – The Notice of Hearing – Reschedule.
 - Board Exhibit E – A Request for Additional Evidence dated June 8, 2000.

 - Petitioner's Exhibit A – A copy of a request for continuance dated April 6, 2000.
 - Petitioner's Exhibit B – A statement of issues and response.
 - Petitioner's Exhibit C – A copy of the PTABOA response to the issues.
 - Petitioner's Exhibit D – An affidavit of Douglas J. Sweeney dated June 5, 2000 with attached grade specification table.
 - Petitioner's Exhibit E – A copy of the Assessment Communicator issued by the State Board in November 1987.
 - Petitioner's Exhibit F – A copy of 50 IAC 2.2-7-6.
 - Petitioner's Exhibit G – A copy of an excerpt from *Town of St. John, et al, v. State Board of Tax Commissioners*, 691 N.E. 2d 1387 (Ind. Tax 1998).

Petitioner's Exhibit H – A copy of an excerpt from *State Board of Tax Commissioners v. Town of St. John, et al.* 702 N.E. 2d 1034 (Ind. 1998).

Petitioner's Exhibit I – Copies of pages 47 and 48, Rule 7, Real Property Assessment Manual.

Petitioner's Exhibit J – An exterior photograph of the subject residence.

Petitioner's Exhibit K – A copy of 50 IAC 2.2-1-52.

Petitioner's Exhibit L – A copy of an excerpt from *Town of St. John, et al, v State Board of Tax Commissioners*, 691 N.E. 2d 1387 (Ind. Tax 1998).

Respondent's Exhibit 1 – A statement of issues and response.

Respondent's Exhibit 2 – The property record card for the subject property.

Respondent's Exhibit 3 – An exterior photograph of the subject residence.

Respondent's Exhibit 4 – An aerial photograph showing the subject property.

5. At the hearing, the Petitioner was asked to provide information regarding the construction cost of the residence. The Request for Additional Evidence is labeled Board Exhibit E and entered as evidence. A response to the Request for Additional Evidence was received on June 23, 2000. The Petitioner's response was not received in the time allocated by the Hearing Officer therefore, will not be considered. The response is labeled Petitioner's Exhibit M and entered as evidence.
6. The Hearing Officer did not view the property. The residence under appeal is located at 11099 Sedgemoor Circle, Carmel, Clay Township, Hamilton County, Indiana.
8. The Form 115 shows the assessed value determined by the PTABOA for March 1, 1999 is land \$46,630 and improvements \$136,500.

Credibility of Witness

9. Mr. Smith is a licensed real estate broker in the State of Indiana. He received the State Board's Level II certification. He has been a property tax consultant for approximately 11 years. Mr. Smith is a salaried employee and part (50%) owner of the business known as Tax Consultants, Inc. Information regarding how Tax Consultants is compensated for the services rendered to the Petitioner is confidential. *Smith testimony.*

Regarding Grade

7. The Petitioners contend the subject residence should not be graded above an A (160%). *Smith testimony and Form 131.* The property record card shows the local officials have applied the grade A +3. (220%).
8. Mr. Smith opines the grade for the subject residence should be B+2 (140%). He basis his opinion on his site visit, the affidavit of Douglas J. Sweeney, and the highlighted Grade Specification Table prepared by Douglas J. Sweeney. *Petitioner's Exhibit D and Smith testimony.*
9. Ms. Harmon asserts the highlighted Grade Specification Table in Petitioner's Exhibit D is not meaningful evidence because the contractor who prepared the exhibit was not present at the State Board hearing to explain why he chose to mark items in the B or C column when they also appear in the A column. The Petitioners did not attend the PTABOA hearing. *Harmon testimony.*

Regarding Neighborhood

14. The Petitioners contend the subject neighborhood desirability rating should be average (C). *Smith testimony and Form 131.* The local officials determined depreciation of five percent (5%) was appropriate for the residence based on

average condition and a neighborhood desirability rating of excellent. (See the property record card.)

15. Mr. Smith contends a neighborhood desirability rating above average is a market value consideration. He asserts the State of Indiana does not determine assessments based on market value. Therefore, the neighborhood desirability rating shouldn't have anything to do with the reproduction cost of the improvement. He opines the assessment for the improvement should not be increased because of a higher than average neighborhood desirability rating because the value of the land has already been assessed. Mr. Smith opines the neighborhood desirability rating should have nothing to do with the application of depreciation. He contends it is wrong to apply an excellent neighborhood desirability rating just because the lots are expensive. *Smith testimony.*

16. Ms. Harmon contends neighborhood desirability is a composite judgment of overall desirability based on agreeable living benefits. An excellent neighborhood desirability rating indicates a prestigious high value area. The subject property is located in a prestigious high value area. The neighborhood desirability rating is used to determine depreciation and is not part of reproduction cost new. Excellent is a neighborhood desirability rating that may be chosen according to the Real Property Assessment Manual. In this case Harmon contends it has been properly applied. *Harmon testimony.*

Conclusions of Law

1. The Petitioner is limited to the issues raised on the Form 130 petition filed with the Property Tax Assessment Board of Appeals (PTABOA) or issues that are raised as a result of the PTABOA's action on the Form 130 petition. 50 IAC 17-5-3. See also the Forms 130 and 131 petitions authorized under Ind. Code §§ 6-1.1-15-1, -2.1, and -4. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v.*

Sproles, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and –2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA’s decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

A. Indiana’s Property Tax System

3. Indiana’s real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.
4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V*).
5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause does not create a personal, substantive right of uniformity and

equality and does not require absolute and precise exactitude as to the uniformity and equality of each *individual* assessment. *Town of St. John V*, 702 N.E. 2d at 1039 – 40.

6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State’s decision.

B. Burden

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. See 50 IAC 17-6-3. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.

9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.
10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere allegations." *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
11. One manner for the taxpayer to meet its burden in the State's administrative proceedings is to: (1) identify properties that are similarly situated to the contested property, and (2) establish disparate treatment between the contested property and other similarly situated properties. *Zakutansky v. State Board of Tax Commissioners*, 691 N.E. 2d 1365, 1370 (Ind. Tax 1998). In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer

must introduce evidence “sufficient to establish a given fact and which if not contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).

14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer’s evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not “triggered” if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State’s final determination merely because the taxpayer demonstrates flaws in it).

C. Review of Assessments After *Town of St. John V*

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property’s market value will fail.
16. Although the Courts have declared the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.
17. *Town of St. John V* does not permit individuals to base individual claims about their individual properties on the equality and uniformity provisions of the Indiana Constitution. *Town of St. John*, 702 N.E. 2d at 1040.

Conclusion Regarding the Credibility of the Witness

18. The State's position is that it has the right to make general inquiry regarding, and to consider, the method by which a witness is compensated. Information about the witness's fee can be relevant and necessary in order to evaluate the potential partiality of the witness. A contingent fee arrangement may be considered to inherently affect the objectivity of a witness. The State believes it appropriate to consider the potential of such an arrangement to improperly motivate the witness and adversely affect the reliability of the testimony. It is for these reasons that the State will consider the method of witness compensation in the process of determining the credibility and weight to be given to testimony of a witness whose fee is contingent on the outcome of the issues that he or she is testifying about. This position is supported by the discussion in the case of *Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874 (Ind. Tax 1993).

Conclusions Regarding Grade

19. The approach to valuing residential homes is primarily found in 50 IAC 2.2-7. The approach to valuing homes is the application of various models to represent typical types of construction. "A model is a conceptual tool used to replicate reproduction costs of given structures using typical construction materials." 50 IAC 2.2-7-6. The model assumes that there are certain elements of construction defined as specifications. These specifications create an average or C grade home. *Id.*
20. "Grade" is defined as the classification of an improvement based on certain construction specifications and quality of materials and workmanship. 50 IAC 2.2-1-30.
21. Not all residences in the State are average or C grade homes. Therefore, grade factors are applied to account for differences in construction specifications and quality of materials and workmanship between the models in the Regulation and

the home being assessed. *Clark*, 694 N.E. 2d at 1236, n. 6. The major grade classifications are “A” through “E”. 50 IAC 2.2-7-6 (d)(1). The cost schedules in the Regulation reflect the “C” grade standards of quality and design. The following grade factors (or multipliers) are assigned to each major grade classification:

“A” grade	160%
“B” grade	120%
“C” grade	100%
“D” grade	80%
“E” grade	40%

50 IAC 2.2-7-6 (e).

22. Intermediate grade levels ranging from A+10 through E-1 are also provided for in the Regulation to adequately account for quality and design features between major grade classifications. 50 IAC 2.2-7-6 (g).
23. The determination of the proper grade factor requires assessors to make a variety of subjective judgments regarding variations in the quality of materials and workmanship and the quality of style and design. *Mahan v. State Board of Tax Commissioners*, 622 N.E. 2d 1058, 1064 (Ind. Tax 1993). The grade selected represents a composite judgment of the overall quality and design. *Mahan*, 622 N.E. 2d at 1064; 50 IAC 2.2-7 (f).
24. Subjectivity is used in the grading process. For assessing officials and taxpayers alike, however, the Regulation provides indicators for establishing grade. The text of the Regulation provides indicators for establishing grade. The text of the Regulation (see 50 IAC 2.2-7-6 (d)), the grade specification table (50 IAC 2.2-7-6 (b)), and graded photographs (50 IAC 2.2-7-10) all provide guides for establishing grade.
25. Though it may be difficult to establish whether a home has a “cheap quality interior finish with minimal built-in features” or is “devoid of architectural

treatment”, this does not mean that a taxpayer is precluded from offering evidence tending to demonstrate that the home has these characteristics. *Whitley*, 704 N.E. 2d at 1119.

26. In property tax appeals, the petitioner has the responsibility to provide probative and meaningful evidence to support a claim that the grade factor assigned by the local officials is incorrect.
27. One manner for the taxpayer to meet its burden in the State’s administrative proceedings is to: (1) identify properties that are similarly situated to the contested property, and (2) establish disparate treatment between the contested property and other similarly situated properties. *Zakutansky v. State Board of Tax Commissioners*, 691 N.E. 2d 1365, 1370 (Ind. Tax 1998). In this way, the taxpayer properly frames the inquiry as to “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Town of St. John V*, 702 N.E. 2d at 1040.
28. The Petitioners did not identify properties that are similarly situated to the property under appeal and did not credibly establish disparate treatment between the subject property and others similarly situated. The attempted grade reduction must fail for this reason.
29. In addition, Petitioner’s Exhibit D (grade specification table with highlighted features) does not establish that the local taxing officials misapplied the tax system in this case. Numerous features set forth on the grade specification table appear in more than one grade category. For example, gutters and conductors appear in grade categories A through C. There are also features on the grade specification table that do not appear in multiple grade categories. For example, a tiled bath is a feature of a B grade home while a ceramic tiled bath is a feature of an A grade home. Further, the grade specification table does not include features that are present in many homes. For example, the specification table does not include features such as skylights and built-in bookcases. Standing

alone, this Exhibit does not establish an incorrect grade application. In fact, the Petitioners witness, Mr. Sweeney highlighted features in the B grade column that also are listed in the A grade column. Mr. Sweeney was not present at the hearing to testify regarding his qualifications in the assessment profession; nor to offer testimony regarding the methodology he used to determine the grade of the home's features.

30. The Petitioners failed to provide construction cost information that the State Board could have dealt with in a meaningful manner. The Tax Court demands quantification techniques for grade application and the State Board reasonably decides that using construction cost information is appropriate when grade issues are raised in property tax appeals. *Garcia v. State Board of Tax Commissioners*, 694 N.E. 2d 794 (Ind. Tax 1998). (See Board Exhibit E and Petitioner's Exhibit M).
31. The Supreme Court held that "the State Board acted within its statutory authority and assessed the Garcia' residence using a methodology that was neither arbitrary nor capricious. The Garcias' home was properly graded at 'A+6.'" *State Board of Tax Commissioners v. Garcia*, 766 N.E. 2d 341 (Ind. 2002). In so holding, the Court in *Garcia* also upheld the assignment of grades in excess of "A."
32. The State used construction costs as a way to arrive at the grade in the *Garcia* case, and the Supreme Court stated it was with the State's statutory authority to do so. In this case, the construction costs were requested, however, the Petitioner did not present them to the State. Petitioner has therefore prevented the local assessing official from applying the methodology endorsed in *Garcia* and has failed to provide evidence that refutes the assignment of a "A+3" grade.
33. As previously stated, the local officials assigned an A+3 grade factor to the home under appeal. For all reasons set forth above, the Petitioners failed to meet their

burden of proof regarding the alleged impropriety of the grade factor assigned. Accordingly, no change is made in the assessment as a result of this issue.

Conclusions Regarding Neighborhood Desirability Rating

34. Neighborhood is a composite judgment of the overall desirability based on the condition of agreeable living and the extent of residential benefits arising from the location of the dwelling. 50 IAC 2.2-7-7.1(f)(7).
35. The Petitioners contend a market value concept is applied when a neighborhood desirability rating above average is used to determine the depreciation of an improvement. Mr. Smith asserts the State of Indiana does not determine taxes based on market value. Therefore, he asserts it is wrong to apply a neighborhood desirability rating above average. He theorizes the assessment for the improvement should not be increased because of a higher than average neighborhood desirability rating because the land value has already been assessed.
36. Though the Courts have declared the cost tables and certain subjective elements of the State Board's regulations constitutionally infirm the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.
37. Physical depreciation for residential dwellings is determined by the combination of age, condition, and neighborhood desirability. 50 IAC 2.2-7-9(c). The Petitioner's burden in this case is to show "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040. The Petitioners have failed to show the local officials erred in the use of the neighborhood desirability rating to establish depreciation.

38. An excellent neighborhood rating indicates a prestigious, high value area.
50 IAC 2.2-7-7.1(f)(7)(A).
39. Ms. Harmon testified the property is located in a very high value prestigious area. The only testimony offered by Mr. Smith in regard to the desirability of the neighborhood in question indicated a “very nice neighborhood” located in a rural area with few conveniences. He also testified the lots are expensive. No other probative evidence was offered by the Petitioners regarding whether the local officials erred in the application of an excellent desirability rating for the subject neighborhood.
40. As stated previously, to meet his burden, the taxpayer must present probative evidence in order to make a prima facia case. In order to establish a prima facia case, the taxpayer must introduce evidence “sufficient to establish a given fact and which if not contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
41. For all of the reasons set forth above, the Petitioners failed to meet their burden of proof regarding the alleged impropriety of the neighborhood desirability rating applied by the local officials. Accordingly there is no change in the assessment as a result of this issue.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this ____ day of _____, 2002.

Chairman, Indiana Board of Tax Review